Petition

No. 81-1443

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IN THE

Supreme Court of the United States

APRIL TERM, 1982

ELMO DEAN DRESSEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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Questions Presented for Review

A. Whether a trial court can abdicate its authority and properly submit a case to a jury where there is necessarily a reasonable doubt as to guilt?

B. Whether an accused in a criminal trial is accorded due process when a conviction based on clearly insufficient evidence is permitted to stand?

C. Whether due process permits the introduction of prejudicial evidence of a transaction which was the subject of pretrial dismissal for insufficiency of evidence?

Table of Contents

	Page
Table of Authorities	iii
Opinion Below	1
Grounds on which jurisdiction of this Court is invoked	1
Constitutional provisons and statutes involved	1
Statement of the Case	2
Argument	4
Appendix	A-1

Table of Authorities

Cases	*Page*
American Tobacco Company v. United States 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946)	4
Battaglia v. United States 349 F.2d 556 (9th Cir. 1965)	6
Morissette v. United States 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952)	6
Mortensen v. United States 322 U.S. 369, 64 S.Ct. 1037, 88 L.Ed. 1331 (1944)	4, 6
Sibley v. United States 344 F.2d 103 (9th Cir. 1965)	6
United States v. Clifford 426 F.Supp. 696 (D.C.N.Y. 1976)	6
United States v. De Garces 518 F.2d 1156 (2nd Cir. 1975)	4
United States v. Eaton 501 F.2d 77 (5th Cir. 1974)	5
United States v. Felice 481 F.Supp 79 (N.D.Ohio 1978)	4
United States v. Freeling 31 FRD 540 (D.C.N.Y. 1962)	6
United States v. Freeman 524 F.2d 337 (7th Cir. 1975)	5
United States v. Garland 337 F.Supp. 1 (D.C.Ill. 1971)	5
United States v. Henny 527 F.2d 479 (9th Cir. 1976)	6

Table of Authorities

Cases	Page
United States v. Melillo 275 F.Supp. 314 (E.D.N.Y. 1967)	4
United States v. Sheiner 273 F.Supp. 997, *aff'd*, 410 F.2d 337 (2nd Cir. 1968), *cert. denied*, 385 U.S. 1001, 87 S.Ct. 703, 17 L.Ed.2d 76	5
United States v. Turner 490 F.Supp. 583 (E.D.Mich. 1979)	5
United States v. Ugl 472 F.Supp. 1236 (N.D.Ohio 1979)	5
United States v. Westbo 576 F.2d 285 (10th Cir. 1978)	5, 6
Other Citations	
18 U.S.C. § 2(a)	1, 2
18 U.S.C. § 2(b)	1, 2
18 U.S.C. § 1343	1, 2
28 U.S.C. § 1254(1)	1

Opinion Below

The opinion of the United States Court of Appeals for the Tenth Circuit is set forth in the Appendix, as is its order of November 27, 1981, denying the petition for rehearing and rehearing en banc.

Grounds on Which the Jurisdiction of this Court is Invoked

28 U.S.C. § 1254(1): certiorari jurisdiction.

Constitutional Provisions and Statutes

U.S. Constitution Amendment V, which provides:

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

* * * *

18 U.S.C. § 2(a):

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(b):

"Whoever willfully causes an act to be done which, if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 1343:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Statement of the Case

Petitioner, Elmo Dean Dressel, was convicted by a Colorado District Court jury of three counts of wire fraud in purported violation of 18 U.S.C. §§ 2 and 1343. The theory of the prosecution was that the Petitioner and his nephew, now dead, used interstate telephone calls in agreeing to supply the Farmer's Marketing Association (hereafter FMA) in Ft. Morgan, Colorado, soybean meal containing at least 44% protein for use in livestock feed, and that Petitioner and his co-defendant fraudulently intended to supply, and did supply, soybean meal with a lower percentage of protein than that called for in the alleged oral contracts.

The deliveries involved in the counts upon which the trial was held took place on February 2, February 3, and March 10, 1979, and evidence was presented as to the circumstances of those deliveries and analyses of the loads of meal. Although an additional count involving a later March 14, 1979 delivery was dismissed prior to trial upon the motion of the prosecutor because of proof problems, testimony was permitted as to that delivery, over defense objections, on the theory that it showed a "pattern of conduct".

The petitioner moved for judgment of acquittal when the prosecution rested, and did not introduce any evidence or adduce any testimony after the motion for judgment of acquittal was denied. The jury returned 2 guilty verdicts; the trial court permitted the verdicts to stand, entered judgment thereon, and sentenced the petitioner to three years imprisonment. On appeal, the Court of Appeals affirmed, with Chief Judge Seth dissenting.

The evidence, presented solely by the prosecution, demonstrated that of the three deliveries of soybean meal covered in the Indictment, samples taken by the FMA from the trucks[1] reflected

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[1] Although the majority of the Court of Appeals referred to there being "some" evidence putting into question the FMA samples, concerning whether the samples were taken by FMA or by the petitioner's drivers, there was in fact no testimony that any person other than the FMA employees took the samples in question, since that was the way it was "supposed" to be done. This makes sense in light of the fact that the FMA, as purchaser, would naturally desire to determine the actual percentage of protein in its purchases, prior to preparation of the livestock feed blends marketed by it.

protein analyses of 44.7% for the February 2, 1979 delivery, 46% for the delivery occurring February 23, 1979, and 49.7% for the March 10 load.

The evidence as to samples taken later by the Colorado Department of Agriculture from grain elevators of FMA, after delivery, reflected, as to the three deliveries, protein percentages of 43.29%, 45.1444. . . .% and 43.8218%, respectively. According to the testimony of an expert called by the prosecution, the average of the two separate samplings reflected, for the February 2, delivery, protein analysis equalling 44%; for the delivery on February 23, 45.7%; and for the March 10, 1979 delivery, a protein percentage of 46.7%.

The government's witnesses also testify that the analytical tolerance for this sort of testing was 3%; in other words, as to testing for 44% protein, the margin for error was slightly over 1%, thus leaving test results falling between 43% and 45% fully within the range of expectable and tolerable testing error.

Likewise established by prosecution witnesses was the fact that it was common industry practice for soybean meal and other grain meal deliveries to fall below prior agreed-upon protein percentages, for one reason or another, and that the Grain Trade Rules of the National Grain and Feed Association directed industry procedures when this occurred. Generally, the procedures called for independent testing, followed by arbitration, and finally adjustment in price, rather than criminal prosecution. In this regard, Government witnesses conceded that such price adjustment measures were expected and indeed were the "manner and common way of doing business in the feed trading business".

Yet despite the clear evidence that each of the three deliveries, whether the samples were averaged or not, satisfied the claimed 44% protein requirements in accordance with permissible statistical deviation, and despite the undisputed testimony that price adjustments resulting from testing and analyses were the common manner of dealing with protein deficits in grain meal sales to the industry, the trial court refused to grant the petitioner's motion for judgment of acquittal, permitted the jury to deliberate and return guilty verdicts unsupported by the evidence, and then refused to set aside such verdicts.

On appeal, the majority of the three judge Court of Appeals panel claimed to apply a standard of review as to whether the evidence, taken in a light most favorable to the prosecution, was "substantial" enough to establish guilt beyond a reasonable doubt, and concluded that the evidence in fact was so substantial. Chief Judge Seth vehemently dissented.

Argument

This case presents this Honorable Court with a unique opportunity to once and for all determine for the lower courts the appropriate test or standard to be utilized in passing on motions for judgment of acquittal at the conclusion of prosecution. In this particular case, the majority of the Court of Appeals for the Tenth Circuit enunciated a desire to view the record "in the light most favorable to the Government in order to determine whether the evidence, both direct and circumstantial, together with all reasonable inferences to be drawn thereform (sic), is substantial enough to establish guilt beyond a reasonable doubt". Whether this test was in fact applied is doubtful from the conclusions reached; however, petitioner respectfully submits that the test applied is erroneous.

Petitioner would direct this Court's attention to the scholarly opinion of Judge Weinstein in *United States v. Melillo,* 275 F. Supp. 314 (E.D.N.Y. 1967). The question is not whether the evidence was substantial, but rather, whether a reasonable jury member would tend to have a reasonable doubt of guilt following the prosecution's case. *See American Tobacco Company v. United States,* 328 U.S. 781, 66 S. Ct. 1125, 90 L.Ed. 1575 (1946); *Mortensen V. United States,* 322 U.S. 369, 64 S.Ct. 1037, 88 L.Ed. 1331 (1944). This differs strongly from the review given civil cases, *see United States v. Melillo, supra,* and requires that trial judges scrupulously review the testimony and exhibits to determine whether there is any evidence from which a reasonable mind could conclude proof of guilt beyond a reasonable doubt. *See United States v. De Garces,* 518 F.2d 1156 (2nd Cir. 1975); *United States v. Felice,* 481 F. Supp. 79 (N.D.Ohio 1978).

In this case, in light of the average analysis and the permissible tolerance of error, it is obvious that neither the trial court nor

the majority of the Court of Appeals considered whether a reasonable jury member could entertain a reasonable doubt on the basis of the evidence presented. In reading the opinion of the Court of Appeals, it is apparent that what was given greatest weight was the fact that *unaveraged* samplings fell below the 44% requirement. As Chief Judge Seth made clear in his perceptive dissent, even assuming a binding contractual agreement to supply 44% protein soybean meal, such agreement was for *loads* of soybean meal, and not for individual samples, and the only evidence introduced in this respect indicated, through exhaustive sampling, that test results within the range of mathematical variation were all above the required percentile. This evidence cannot support the jury's verdict, permitting no inference of guilt.

Indeed, if the evidence had merely given the jury a choice between reasonable inferences of fact, this in itself requires setting aside the jury verdict for insufficiency of proof. *See United States v. Turner*, 490 F.Supp. 583 (E.D.Mich. 1979). Where, as here, the uncontradicted evidence simply cannot support a reasonable jury person in eliminating reasonable doubt as to guilt, the resultant conviction cannot stand.

To support conviction of federal wire fraud under 18 U.S.C. § 1343, the prosecution must prove both a scheme to defraud and an interstate communication made in furtherance of that scheme. *United States v. Freeman*, 524 F.2d 337 (7th Cir. 1975). *See also United States v. Garland*, 337 F.Supp. 1 (D.C.Ill. 1971). The very essence of the prosecution under the wire fraud statute, therefore, is the intent or knowledge of falsehood held by the accused. *United States v. Ugl*, 472 F.Supp. 1236 (N.D.Ohio 1979) (bribery of public officials). Since intent to defraud is a material element, good faith or inadvertent conduct is a complete defense. *See United States v. Sheiner*, 273 F.Supp. 997, *aff'd*, 410 F.2d 337 (2nd Cir. 1968), *cert. denied*, 385 U.S. 1001, 87 S.Ct. 703, 17 L.Ed.2d 76; *United States v. Westbo*, 576 F.2d 285 (10th Cir. 1978). It goes without saying, however, that without evidence of facts demonstrating that some entity was, in fact, defrauded, or attempted to be defrauded, no conviction under this statute may stand.

Here, unless one or more of the three loads covered by the counts prosecuted were shown beyond a reasonable doubt to contain protein in an amount less than 44%, no fraud or attempt to defraud was shown. The evidence in this regard was clear. It was the practice in the feed trade industry to merely adjust prices when protein levels fell below that called for in a particular agreement. It was further shown that this was a common occurrence.

Likewise, the evidence demonstrated that each of the samples, whether taken by the State of Colorado or the FMA, fell within the permissible margin of error demonstrating protein content above 44%. When the samples were averaged, protein content about 44% was shown as to all three deliveries. Obviously, it would be entirely improper to focus upon any single isolated sampling, as apparently the jury, and quite clearly the Court of Appeals, did. The question, as Chief Judge Seth pointed out, was whether the *deliveries* contained protein in the required proportion, and there certainly was a complete absence of any proof to the contrary in this case.

Where material variance is shown between the charges filed and the proof adduced, judgment of acquittal must be entered. *See, e.g., United States v. Eaton,* 501 F.2d 77 (5th Cir. 1974). The reason for this is that juries must not be permitted to speculate and convict on mere supposition. *See United States v. Clifford,* 426 F.Supp. 696 (D.C.N.Y. 1976).

Petitioner is fully cognizant that his case does not involve novel questions of constitutional and statutory interpretation, but rather, devolves around the question of whether he received a fair trial. This does not, however, make more just in any sense the convictions returned by the jury, and petitioner would direct this Honorable Court's attention to its clear and unequivocal statement of principle in *Mortensen v. United States, supra,* that this Court has granted certiorari and "never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict". *See also Morissette v. United States,* 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed 288 (1952). Therefore, this petition for writ of certiorari should not be viewed as "merely" involving a question of sufficiency of evidence, in light of the fact that the convictions

returned in this case violate the petitioner's right to due process, and will deprive him of his liberty, without regard to the novelty of the issues presented. Review of this case on certiorari will prevent a great injustice from being consummated.

The trial court also denied the petitioner due process in permitting the jury to hear testimony concerning a delivery occurring March 14, 1981, which delivery was the subject of a separate count dismissed prior to trial because of proof problems. The trial judge permitted this evidence as going towards a "pattern of conduct", but it is well established that each separate use of interstate communication constitutes a separate crime which should be separately charged under 13 U.S.C. § 1343. *See, e.g., Sibley v. United States,* 344 F.2d 103 (9th Cir. 1965); *United States v. Freeling,* 31 FRD 540 (D.C.N.Y. 1962).

Well-reasoned authority makes clear that the jury should not be exposed to evidence relating to alleged criminal conduct not the subject of the charged offenses, including alleged conduct taking place outside the period of time actually covered by the Indictment. *See United States v. Henny,* 527 F.2d 479 (9th Cir. 1976) (evidence concerning a period of time outside the indictment properly excluded); *Battaglia v. United States,* 349 F.2d 556 (9th Cir. 1965). *See also United States v. Westbo, supra* (mail fraud).

In its opinion, the majority of the Court of Appeals concluded that since Count I of the Indictment still alleged that a scheme continued "until on or about March 14, 1979", even after dismissal of the charge relating to that date, that this made permissible the otherwise inadmissible evidence adduced. What this ignores, however, is the fact that the language referred to in Count I should have been stricken as prejudicial surplusage following dismissal, upon the motion of the prosecutor based on insufficiency of evidence, of the count covering that delivery. If a particular charge cannot be proven beyond a reasonable doubt, evidence pertaining to that charge should not be displayed to the jury in hopes that it will convict because of some other conduct. Since there was a factual dispute as to the percentage agreed upon as to the March 14 delivery, and because the percentage demonstrated by testing as to that delivery reflected a much lower percentage than the three prior shipments, testimony as to this

delivery was highly prejudicial, and should not have been admitted. Its introduction into evidence denied the petitioner due process, and for this reason, also, certiorari should be granted.

Respectfully submitted,

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Appendix A

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 80-1004

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ELMO DEAN DRESSEL,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D. C. No. 79-CR-493)

Gary H. Hemminger of Hemminger & Whittaker, Englewood, Colorado, for Defendant-Appellant.

Susan R. Roberts, Assistant United States Attorney (with Joseph Dolan, United States Attorney, on the brief), Denver, Colorado, for Plaintiff-Appellee.

Before SETH, Chief Judge, BARRETT and McKAY, Circuit Judges.

McKAY, Circuit Judge

This is an appeal from a conviction, after a trial by jury, on three counts of fraud by wire in violation of 18 U.S.C. §§ 1343, 2. The indictment charged that appellant and a co-defendant devised a scheme or artifice to defraud Farmers Marketing Association (FMA) by delivering to FMA, with the intent to defraud FMA, soybean meal consisting of less than 44 percent protein under a contract to deliver soybean meal with a protein content of 44 percent.

The main contention of appellant is that the evidence against him did not amount to a prima facie case and that it therefore should not have been submitted to the jury. In evaluating this contention, "we must view the entire record 'in the light most favorable to the Government in order to determine whether the evidence, both direct and circumstantial, together with all reasonable inferences to be drawn thereform (sic), is substantial enough to establish guilt beyond a reasonable doubt.' " *United States v. Petersen*, 611 F. 2d 1313, 1317 (10th Cir. 1979) (quoting *United States v. Hubbard*, 603 F.2d 137, 142 (10 Cir. 1979)), *cert. denied*, 447 U.S. 905 (1980). Having thoroughly examined the entire record in this case, we hold that it contains evidence substantial enough to support the verdicts of the jury. The record reflects that numerous interstate communications by telephone occurred between FMA and the company owned by the two defendants during or about the periods of time specified in the indictment. These calls concerned FMA's purchases of soybean meal from the defendants and their delivery of the meal to FMA. Thus, there is substantial evidence that the defendants engaged FMA in interstate communications by telephone with the specific intent to advance their scheme, if they had one. The evidence of this appellant's participation is also sufficient.

The evidence that appellant and his co-defendant in fact devised a scheme or artifice to defraud FMA is also substantial. The record indicates that many of the government's samples taken from the deliveries of soybean meal covered by the indictment were below 43 percent in protein content, several samples being below 40 percent.[1] Indeed, *every* sample taken from one of

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[1] In arguing that the evidence against him is insufficient, appellant places great reliance on tests of these deliveries purportedly conducted by FMA that did not reflect these deficiencies. However, there is some evidence in the record that

the loads covered by the indictment contained less than 40 percent protein. Similarly, other loads of soybean meal often exceeded in fiber content the 7 percent maximum, apparently because they contained excessive quantities of soybean hulls or other filler materials. FMA witnesses testified that the protein content of each and every load of the soybean meal for which FMA contracted with appellant was to consist of 44 percent protein. The price FMA paid for each and every delivery reflected this fact. Thus, on the basis of these significant deficiencies in the protein content of deliveries of soybean meal to FMA, there was considerable evidence from which the jury could infer that appellant participated in a scheme or artifice to replace some of the more expensive 44 percent soybean meal in the shipments with less expensive soybean hulls or other filler materials — a scheme to make a fraudulent profit at the expense of FMA in violation of 18 U.S.C. §§ 1343, 2.

The existence of such a scheme is corroborated by the fact that the co-defendants purchased 338 tons of soybean hulls not long before they made shipments of soybean meal to FMA. Although it is consistent with industry practice to mix soybean hulls with 47.5 percent protein meal to obtain 44 percent protein meal, the record indicates that the co-defendants never purchased more than 63 tons of 47.5 percent protein meal — clearly an insufficient quantity to explain the purchase of so large an order of soybean hulls as necessary ingredients for the making of 44 percent protein meal from 47.5 percent protein meal. The defendants made no attempt to rebut the obvious implication of these purchases that they had purchased such extraordinarily large quantities of soybean hulls to over-dilute their shipments under the FMA contract of "44 percent protein meal" with plugs of the hulls in order to defraud FMA. For instance, they offered no evidence to show that they sold or intended to sell any of the hulls as such to buyers of hulls. Moreover, it was undisputed that they had all the equipment necessary to adulterate shipments of the

FMA did not take the load samples itself but simply accepted bags containing samples from the drivers making the deliveries, a fact that obviously reduces the evidentiary weight to which the "FMA samples" are entitled. Furthermore, even if it were clear that FMA had taken the samples, those samples would constitute mere conflicting evidence as compared to the government samples. Such conflicts in the evidence must be resolved by the trier-of-fact, in this case the jury, and not by an appellate court.

soybean meal with hulls and that they had in fact used the equipment to perform some kind of mixing operation immediately before making at least one of the deliveries of the meal covered by the indictment. Furthermore, there is evidence in the record that one of the defendants used a false name during his dealings with FMA — an additional fact which tends to corroborate the existence of an intent to defraud FMA. On the basis of this record, we can hardly say that viewed in the light most favorable to the government, the evidence, both direct and circumstantial, along with all reasonable inferences that can be drawn therefrom, is too insubstantial to establish guilt beyond a reasonable doubt.

Appellant also contends that in admitting certain evidence into the government's case against appellant, the trial court committed two errors. He first argues that the court should not have admitted evidence of a March 13, 1979 delivery of soybean meal, because that delivery constitutes inadmissible evidence of illegal activities other than those charged in the indictment. This argument, however, is without merit. Evidence of this delivery was introduced to show the extent of the scheme *as charged,* not to show other crimes or similar acts. The indictment alleged that the defendants' scheme continued "until on or about March 14, 1979," thereby embracing the March 13, 1979 delivery. If, as appellant suggests in his brief, this evidence "in all probability was the primary motive of the jury in convicting" him, Appellant's Brief at 14, the verdicts are not wanting for a proper foundation.

Appellant also argues that the court erred in admitting opinion testimony as to the true identity of a person who made repeated telephone calls to FMA identifying himself as John Woolery. An employee of FMA made an in-court identification of appellant as the person who had repeatedly identified himself to the employee both *on the telephone* and *in person* as John Woolery. We find that the employee, therefore, had more than an adequate basis on which to make the identification, and we therefore find no error in the admission of this evidence. *See* Federal Rules of Evidence 901(b)(5).

AFFIRMED.

80-1004 — United States of America v. Elmo Dean Dressel

SETH, Chief Judge, dissenting:

The issue on appeal is the application of Rule 29(a) of the Federal Rules of Criminal Procedure. *See* Cartwright v. United States, 335 F.2d 919 (10th Cir.). The motion for acquittal was made at the close of the government's case and denied. The defendants then chose to put on no evidence. Thus the trial court had to decide as a matter of law whether there was evidence which if believed would be sufficient to establish the elements of the offense beyond a reasonable doubt. We are not concerned with the typical sufficiency of the evidence test raised on appeal as in United States v. Petersen, 611 F.2d 1313 (10th Cir.). Cartwright v. United States, 335 F.2d 919 (10th Cir.), and United States v. Coleman, 501 F.2d 342 (10th Cir.) describe the standard for review which should be applied. *See also* United States v. Lopez, 576 F.2d 840 (10th Cir.); United States v. Dowen, 496 F.2d 314 (10th Cir.); United States v. Tager, 481 F.2d 97 (10th Cir.); and Lewis v. United States, 420 F.2d 1089 (10th Cir.).

Much of the evidence here is circumstantial and this places a somewhat different burden on the court as to inferences. Also we must evaluate the several possible inferences to be drawn from facts directly established. These are inferences which are consistent with guilt and with innocence.

I must respectfully dissent because I have two basic differences with the majority. The first is that in my view the tests made by the State of Colorado did not prove what the several loads contained. Thus there was a failure of proof. The second difference is that the inferences expressed in the majority opinion are necessary to the result it reaches but in my view they cannot be reasonably drawn from the evidence no matter in what "light" it is placed.

As to the testing, the majority states that "many of the government's samples taken from the deliveries of soybean meal covered by the indictment were below 43 percent in protein content, several samples being below 40 percent." This is obviously what the proof was, but the contract was directed to *loads* of meal. As the opinion indicates, "each and every load" was to consist of 44 percent protein. The individual samples were

not probative of an entire load. The government witness said each sample was separately analyzed. The chemist testified that he did not average any of the test results. The government's brief says, "In fact, the 'average' figures appeared from adding machine tapes supplied by defendants' counsel during cross-examination." Thus the proof was only, as the majority opinion states, that "many" of the samples were below 44 percent. Thus for the February 2 load 14 of the 25 samples were below 43.5 percent. The other samples thus showed protein above 43.5 percent. The proof thus was that certain portions of the loads contained meal with less than 44 percent. This was all that it showed, but this was not the issue. The trial court on the basis of the proof as to the content of the loads should have granted the motion for acquittal.

The most disturbing part of the proof was that even should the state testing samples have been averaged they show 43.29 percent, 45.14 percent and 43.82 percent for the three loads. This shows only one load below the contract amount with the three percent tolerance applied (43.48 percent), and this by .19 of a percentage point. The validity of any chemical testing would cast doubt on such a variation.

To me, the majority also draws several impermissible inferences to support its position. The first such inference is that defendants bought a lot of hulls; therefore, they were going to put too many in the shipments. The opinion says "such a scheme is corroborated by the fact that appellants purchased 338 tons of soybean hulls," and that defendants purchased an insufficient quantity (of meal) to explain so large an order of hulls, and the "obvious implication" that the large quantity of hulls was to "over-dilute" their shipments.

The majority also draws an inference of guilt from the fact defendants had machines to mix hulls with meal. Thus the majority states that "appellants had all the equipment necessary to adulterate shipments," and had used the equipment. This inference of guilt should not be drawn from such facts as the mixing of hulls with meal was an accepted practice in the business.

Also, the majority infers from the use by one defendant of an assumed name that this "tends to corroborate the existence of

appellants' intent to defraud FMA." Apparently the other defendant did not use an assumed name. Both defendants have the same name. It does not seem reasonable to so draw an inference of intent to defraud.

The entire case is mostly inferences and circumstantial evidence except that it is clearly established in the record that it was an accepted practice in the industry to mix hulls with the meal to adjust the overall protein content. There is nothing wrong with doing that, nor with having machinery to mix the ingredients, nor to use the machinery, nor to have a large supply of hulls. If the practice is an accepted one in the business no inferences should be drawn from having the equipment and the ingredients. It is also not a crime to deliver loads which are poorly mixed. The inferences which may be drawn from the proof were consistent with innocence.

The proof showed that it was the practice in the industry to make price adjustments for variations in protein content under these circumstances.

The evidence before the trial court included both the State of Colorado testing and the testing by the purchaser. The purchaser's testing results were stipulated to by the government as such results. The state expert, however, did not agree with the testing methods used by FMA. The difference in the testing results was not a conflict in the evidence, but demonstrated instead the difference resulting from testing results applied to entire loads as contrasted to portions of loads. This was the choice for the trial judge. No one was or is concerned with weighing conflicting evidence. The FMA testing was the only evidence applied to entire loads.

The record shows that the testing reported by the purchaser as to loads showed all loads above the required percentage. Apparently the number and quantity of FMA samples were unknown, but they showed for the three loads charged, 44.7 percent, 46.4 percent, and 49.7 percent. Thus the trial court had the variations between the application of the test results. The purchaser's testing showed results well above the contract load requirements. The trial court had the evidence that some of the state samples showed that the tested part of the loads was below 43 percent.

The difference in the application of test results to the contract requirements must have created a substantial doubt under United States v. Lopez, 576 F.2d 840 (10th Cir.), after the application of appropriate standards.

I would thus hold that the trial court should have granted the motion for acquittal at the close of the government's case.

Appendix B
November Term — November 27, 1981

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

No. 80-1004

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ELMO DEAN DRESSEL,

Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk